Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

DANIEL PACK, GUNNERY SERGEANT,
UNITED STATES MARINE CORPS,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether this Court should decide the unsettled question of federal law presented to the Court of Appeals for the Armed Forces in the case at bar; namely, if *Crawford v. Washington*, 541 U.S. 36 (2004) implicitly overruled *Maryland v. Craig*, 497 U.S. 836 (1990) and made it violative of an accused's Sixth Amendment right to confrontation when an accused does not meet his accuser face-to-face at trial.

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## PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The principal opinion of the Court of Appeals for the Armed Forces is *United States v. Pack*, 65 M.J. 381 (C.A.A.F. 2007). App. A, *infra*, at 1a. The principal opinion of the Navy-Marine Corps Court of Criminal Appeals is *United States v. Pack*, 2006 CCA LEXIS 286 (N.M.Ct.Crim.App. October 26, 2006). App. B, *infra* at 13a.

## JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on December 12, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution is reproduced in App. C, *infra* at 38a.

## STATEMENT

The minor accuser in this case, MP, testified remotely from the law library adjacent to the court via one-way, closed-circuit television. MP sat at a table facing a video camera that relayed her image into the courtroom and onto a thirty-two inch television screen. A speaker-phone allowed audio communication between the law library and the courtroom. Because it was a one-way, closed-circuit television system, MP could not see Petitioner or anyone else in the courtroom.

Trial procedures such as the one-way video feed used in Petitioner's case have been the subject of intense debate at this Court for nearly twenty years as two sharply divided camps have struggled over the basic definition and constitutional requirements of the Sixth Amendment's Confrontation Clause. On one side of the debate, Justice Scalia has argued that the Confrontation Clause guarantees "a right to *meet face to face* all those who appear and give evidence *at trial*." *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988). On the other side, retired Justice O'Connor argued that the right to confrontation was "not absolute," and that "face-to-face" confrontation could be dispensed with when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Coy*, 487 U.S. at 1024 (1988) (O'Connor, J. concurring); *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

In *Coy v. Iowa*, Justice Scalia, writing for four members of the Court, invalidated a trial procedure (very similar to the one at issue in this case) where

the witnesses were unable to see the accused. But this Court left for another day whether there were exceptions "to the irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" *Coy*, 487 U.S. at 1021 (internal citations omitted).

Justice O'Connor wrote a separate concurring opinion, in which Justice White joined. She argued that the right to face-to-face confrontation, "even if located at the 'core' of the Confrontation Clause," is not absolute, and she rejected "any suggestion to the contrary in the Court's opinion." *Coy*, 487 U.S. at 1024 (O'Connor, J., concurring). The "strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring).

Two years later, in *Maryland v. Craig*, the Supreme Court, by a 5-4 vote, answered the question it had declined to answer in *Coy*. This Court upheld a Maryland statute that allowed victims of child abuse to testify via one-way closed-circuit television upon a determination by a trial court that such measures were necessary to protect the child witness from trauma. *Maryland v. Craig*, 497 U.S. 836 (1990). Writing for the five-member majority, Justice O'Connor stated, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 851. Citing this Court's earlier

decision in *Ohio v. Roberts*, the majority declared "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56 (1980); *Craig*, 497 U.S. at 849 (Justice O'Connor had also cited *Roberts* in her *Coy* dissent. *See Coy*, 487 U.S. at 1024 (O'Connor, J., dissenting)). "[T]he Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Craig*, 497 U.S. at 857. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant...." *Craig*, 497 U.S. at 845.

Writing for the four members of the dissent, Justice Scalia argued that the majority opinion was incorrect "because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." *Craig*, 497 U.S. at 836, 861 (Scalia, J., dissenting). "The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Id.* "The Court today has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." *Id.* at 870. Justice Scalia continued, "I have no need to defend the value

of confrontation, because the Court has no authority to question it." *Id.*

Justice Scalia concluded his dissent by declaring, "I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction." *Craig*, 497 U.S. at 836, 869 (Scalia, J., dissenting).

As this Court would later recognize, in *Crawford v. Washington*, this Court overturned its decision in *Roberts* because its previous "interpretation of the Confrontation Clause set out in *Roberts* was unsound in several respects." *Whorton v. Bockting*, 127 S. Ct. 1173, 1180 (2007). In doing so, this Court struck down the only precedent the *Craig* Court relied upon for the radical proposition that the "Confrontation Clause reflects a *preference* for face-to-face confrontation at trial." *Craig*, 497 U.S. at 848.

Now writing for seven members of the majority, Justice Scalia wrote, "[the] Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford v. Washington*, 541 U.S. 36, 67 (2004). This Court rejected the reliability test established in *Roberts* and followed by Justice O'Connor in *Coy* and in *Craig*. *Crawford v. Washington*, 541 U.S. at 62. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* The Constitution commands, "not that evidence be reliable, but that

reliability be tested in a particular manner: by testing in the crucible of cross-examination." *Id.* And the Framers did not mean to leave "the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. *Id.*

Importantly, this Court explicitly rejected modern exceptions to the Confrontation Clause, such as those at issue in *Roberts*, *Coy*, and *Craig*:

> The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right...to be confronted with the witnesses against him," is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.

*Crawford*, 541 U.S. at 54 (citing *Mattox v. United States*, 156 U.S. 237, 243, 39 l. Ed. 409, 15 S. Ct. 337 (1895)). Justice O'Connor dissented in *Crawford*. But this time, she was joined only by the late Chief Justice Rehnquist. In light of *Crawford*, the Court's holding in *Craig* that the Confrontation Clause is subject to public policy concerns and can be abrogated "where the reliability of the testimony is otherwise assured," is unsound. In fact, the *Craig* Court's only precedent for such a proposition, *Roberts*, has been overruled. The Sixth Amendment does not say that an accused can confront his accusers unless public policy

concerns dictate otherwise. And it also does not limit the confrontation right if the testimony to be given is otherwise "reliable." "For good or for bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Maryland v. Craig*, 497 U.S. at 870 (Scalia, J., dissenting).

## REASON FOR GRANTING THE PETITION

**The Lower Court Has Decided an Unsettled Question of Federal Constitutional Law; Whether the Sixth Amendment Mandates Face-to-Face Confrontation by One's Accuser At Trial.**

The Court of Appeals for the Armed Forces upheld Petitioner's conviction but at the same time noted that there are aspects of *Crawford* that are difficult to reconcile with aspects of *Craig*. *Pack*, 65 M.J. 381, 381 (C.A.A.F. 2007). The lower court noted that there are "glimmers of an interpretation of the Confrontation Clause tied more closely to its text and historical context in the Supreme Court's recent opinions." *Pack*, 65 M.J. at 384 (citing *Davis v. Washington*, 547 U.S. 813 (2006) and *Crawford*, 541 U.S. at 43-47). Statements in the *Crawford* opinion, the lower court noted, are difficult to reconcile with certain other statements in the *Craig* opinion:

> *Compare, e.g., Craig*, 497 U.S. at 848 ("a literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long

> rejected as unintended and too extreme'" (citation omitted), and *id.* at 845 ("any exception to the right 'would surely be allowed only when necessary to further an important public policy'") (citation omitted), with *Crawford*, 541 U.S. at 51 ("[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices"), *id.* at 54 ("[t]he test of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts"), and *id.* at 61 ("[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation").

*Pack*, 65 M.J. at 384.

Ultimately, the lower court held that this Court did not overrule *Craig* or even mention it in *Crawford*. *Pack*, 65 M.J. at 381-82. Hence, *Craig* continues to control the issue of whether and how child witness testimony via closed-circuit television is constitutional. *Pack*, 65 M.J. at 381-82. To the lower court, this Court's holding in *Crawford* turned on whether and under what circumstances testimonial hearsay, which by definition does not involve face-to-face confrontation at trial, may be admitted, consonant with the Confrontation Clause of the Sixth Amendment. *Id.* According to the

lower court, although reliability of evidence is no longer relevant to statements made outside of court after *Crawford*, the *Roberts* reliability test (via *Craig*) and public policy concerns still govern confrontation in court. This Court cannot allow such an interpretation to prevail, as the Confrontation Clause must require face-to-face confrontation before and during courts-martial.

In its opinion, the lower court noted that the issue of face-to-face confrontation was not directly implicated by *Crawford*, although *Crawford* did consider fully the historical context within which the Confrontation Clause was drafted and the evils at which it was aimed. *Pack*, 65 M.J. at 383 (citing *Crawford*, 541 U.S. at 43-50.) But it ultimately concluded that the Sixth Amendment, as informed by the common law, required, at least in the context of testimonial hearsay, "unavailability and a prior opportunity for cross-examination," not face-to-face confrontation at trial. *Pack*, 65 M.J. at 383 (citing *Crawford*, 541 U.S. at 68).

The lower court opined that:

> In light of the dissent in *Craig* and the plethora of state and federal laws permitting remote testimony, including M.R.E. 611 and R.C.M. 914A, we expect that if the Supreme Court were overruling or undermining Craig, it was have said so explicitly. See, e.g., *Carmell v. Texas*, 529 U.S. 513, 538, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (stating that where the Supreme Court expressly overruled

> two cases in a decision, it should not be assumed that it impliedly overruled a third in the same decision).

*Pack*, 65 M.J. at 383.

The lower court rejected Petitioner's claim that *Crawford* overruled *Craig* by implication because it undermined the foundations upon which it rested. *Id.* The lower court cited this Court's precedent directing courts of appeals to leave to this Court whether precedent has been implicitly overruled. *Pack*, 65 M.J. at 384, 385 (citations omitted). But even if overruling by implication were acceptable, the lower court noted, it disagreed that *Crawford* had the impact that Petitioner suggested. *Id.*

To the lower court, *Crawford* explicitly rejected the rationale of *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), that admitting the preliminary hearing testimony of an unavailable witness did not violate the Confrontation Clause of the Sixth Amendment because reliability could be "inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," because "hearsay rules and the Confrontation Clause are generally designed to protect similar values," and "stem from the same roots." *Pack*, 65 M.J. at 384 (citing *Roberts*, 448 U.S. at 66).

The lower court noted that the focus in *Craig* was not simply on reliability, but on the adversarial process. That focus was retained in *Crawford*. *Pack*, 65 M.J. at 384 (citing *Craig*, 497 U.S. at 846 and *Crawford*, 541 U.S. at 61). Yet the lower court noted that *Crawford* did not hold that face-to-face

confrontation is required in every case. Rather, it held that the Confrontation Clause required cross-examination and unavailability before testimonial hearsay could be admitted into evidence. *Pack*, 65 M.J. at 384 (citing *Crawford*, 541 U.S. at 69). While Petitioner concedes that the no other federal court has held that *Crawford* implicitly overruled *Craig*, the legal reasoning in *Crawford* and this Court's overruling of *Ohio v. Roberts* as to reliability, has certainly called into question *Craig's* viability.

The lower court joined the "weight of authority holding that Craig continues to control the questions whether, when, and how remote testimony by a child witness in a criminal trial is constitutional." *Pack*, 65 M.J. at 385 (citing *United States v. Yates*, 438 F.3d 1307, 1313-18 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 553-54 (8th Cir. 2005); *State v. Henriod*, 2006 UT 11, P 13-17, 131 P.3d 232, 237; *State v. Blanchette*, 35 Kan. App. 2d 686, 134 P.3d 19, 29 (Kan. Ct. App. 2006); *State v. Griffin*, 202 S.W.3d 670, 680-81 (Mo. Ct. App. 2006); *State v. Vogelsberg*, 2006 WI App 228, P 13-17, 297 Wis. 2d 519, 527-29, 724 N.W.2d 649, 654). The lower court also noted that it ultimately falls to this Court to declare its precedent has been implicitly overruled. *Pack*, 65 M.J. at 384, 385. This Court, as the ultimate authority on Federal Constitutional law, should grant review of Petitioner's case to declare that *Crawford* implicitly overruled *Craig* or expressly overrule *Craig*, as the right to confront one's accusers applies equally outside the courtroom as it does within. As Justice Scalia declared almost

twenty years ago, "For good or for bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Maryland v. Craig*, 497 U.S. at 870 (Scalia, J., dissenting).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## Appendix A

UNITED STATES, Appellee
v.
Daniel M. PACK Jr., Gunnery Sergeant
U.S. Marine Corps, Appellant

No. 07-0085
Crim. App. No. 200400772

United States Court of Appeals for the Armed Forces

Argued October 25, 2007
Decided December 12, 2007

RYAN, J., delivered the opinion of the Court, in which EFFRON, C.J., and BAKER, ERDMANN, and STUCKY, JJ., joined.

Counsel:
For Appellant: Lieutenant Kathleen L. Kadlec, JAGC, USN (argued); Lieutenant Brian L. Mizer, JAGC, USN.

For Appellee: Captain Roger E. Mattioli, USMC (argued); Major Brian K. Keller, USMC (on brief); Commander Paul C. LeBlanc, JAGC, USN.

Amicus Curiae for Appellant: Susan A. Castorina (law student)(argued); Seth M. Lahn, Esq. (supervising attorney); Emmanuel V.R. Boulukos, (law student) (on brief) -- for the Indiana Law School, Bloomington.

Amicus Curiae for Appellee: Paul H. Threatt (law student) (argued); Aviva A. Orenstein, Esq. (supervising attorney);

Aravon B. McCalla (law student) (on brief) -- for the Indiana Law School, Bloomington.

Military Judges: S. M. Immel(arraignment) and P. J. Betz Jr. (trial)

Judge RYAN delivered the opinion of the Court.

The decisional issue in this case is whether *Crawford v. Washington*, 541 U.S. 36 (2004) so undermined the reasoning in *Maryland v. Craig*, 497 U.S. 836 (1990) that this Court is free to disregard Craig and hold that anything short of face-to-face confrontation at trial violates the Sixth Amendment. If so, it would inexorably follow that Rule for Courts Martial (R.C.M.) 914A and Military Rule of Evidence (M.R.E.) 611(d), which are based on the holding in Craig and permit a child witness to testify via closed-circuit television, are unconstitutional.

There is support for Appellant's argument that aspects of *Crawford* are difficult to reconcile with aspects of *Craig*. See infra, at pp. 8-11. But the Supreme Court did not overrule *Craig* or even mention it in *Crawford*. And the holding in *Crawford* turned on whether, and under what circumstances, testimonial hearsay, which by definition does not involve face-to-face

confrontation at trial, may be admitted, consonant with the Confrontation Clause of the Sixth Amendment. Consequently, *Craig* continues to control the questions whether and how child witness testimony via closed-circuit television is constitutional.

I. *Procedural Background*

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of six specifications of indecent acts with a child in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2000). The sentence adjudged by the court-martial and approved by the convening authority included a dishonorable discharge, confinement for twenty-three years, and reduction to the lowest enlisted grade. The Navy-Marine Corps Court of Criminal Appeals dismissed one specification, reassessed the sentence, and approved the adjudged sentence, but reduced confinement to twenty-two years. *United States v. Pack*, No. NMCCA 200400772, 2006 CCA LEXIS 286, at *27, 2006 WL 4579021, at *10 (N-M. Ct. Crim. App. Oct. 26, 2006) (unpublished).

On Appellant's petition, we granted review of the question:

> [WHETHER] IN LIGHT OF CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), WAS APPELLANT DENIED HIS SIXTH AMENDMENT

RIGHT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE ALLOWED MP TO TESTIFY FROM A REMOTE LOCATION VIA ONE-WAY CLOSED-CIRCUIT TELEVISION.[1]

II. *Factual Background*

The charges referred against Appellant arise from his sexual abuse of his eight-year-old stepdaughter MP over a period in excess of a year. At the time of trial, MP was ten years old. Appellant's actions resulted in MP suffering psychological problems, for which she required extensive counseling. The Government petitioned the military judge to allow MP to testify from a remote location via one-way closed-circuit television pursuant to M.R.E. 611(d) and R.C.M. 914A. The defense objected to the request, arguing that it denied Appellant his right to confront his accuser.

The military judge conducted an evidentiary hearing on the Government's motion. At the

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[1] 65 M.J. 276 (C.A.A.F. 2007). We heard oral argument in this case at the Indiana University School of Law, Bloomington, Indiana, as part of the Court's Project Outreach. *See United States v. Mahoney*, 58 M.J. 346, 347 n.1 (C.A.A.F. 2003). This practice was developed as part of a public awareness program to demonstrate the operation of a federal court of appeals and the military justice system.

hearing, the military judge heard expert testimony from MP's treating psychologist. Based on this testimony, the military judge made findings of fact and conclusions of law. The military judge recognized that the requirements of M.R.E. 611 must be read in conjunction with *Craig*, 497 U.S. at 836, in which the Supreme Court held the use of remote live testimony via one-way closed-circuit television permissible only where particular circumstances were found.[2] Based on the evidence presented, the military judge found those circumstances in this case: the need to protect the welfare of the child witness seeking to testify; traumatization of the child by the presence of the defendant, not the courtroom generally; and a more than *de minimis* emotional distress suffered by the child.

MP's testimony was under oath and in the presence of trial counsel and defense counsel. A television monitor was positioned in the courtroom so that Appellant, the members, the military judge, and the court reporter could hear MP and observe her demeanor. MP testified on both direct and cross-examination from the remote location without ever seeing Appellant.

III. *Analysis*

The Confrontation Clause of the Sixth Amendment provides, *inter alia*, that: "In all criminal

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[2] Accord *United States v. McCollum*, 58 M.J. 323, 330 (C.A.A.F. 2003).

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The question of what law controls resolution of a claimed constitutional violation is one of law, which we review de novo. *See United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

A. *Maryland v. Craig*

In *Craig*, the Supreme Court upheld a Maryland statute that required: the "child witness . . . be competent to testify and. . . testify under oath; the defendant retain[] full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant . . . [be] able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." 497 U.S. at 851.

In the process, the Supreme Court reasoned that "[a]lthough face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' we have nevertheless recognized that it is not the sine qua non of the confrontation right." *Id.* at 847 (citations omitted). *Craig* went on to reject a literal reading of the Confrontation Clause in favor of a "'preference for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" *Id.* at 849 (citations omitted).

*Craig* then considered those principles in the context of a child witness testifying remotely against a defendant in a criminal trial. Ultimately, the Supreme Court held that one-way closed-circuit testimony was admissible and consonant with the requirements of the Confrontation Clause when: (1) the court determines that it is necessary "to protect the welfare of the particular child witness"; (2) the court finds "that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the trial court [finds] that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*." *Id.* at 855-56 (citations omitted).

Appellant does not argue that the requirements under R.C.M. 914A or M.R.E. 611(d) were not met. Nor does he argue that the three requirements outlined in Craig went unsatisfied. The narrow question in this case is whether the holding in *Craig* allowing this type of testimony may be disregarded by this Court in light of *Crawford*.

B. *Crawford v. Washington*

*Crawford* considered whether and how testimonial hearsay statements made by witnesses who did not testify at trial were admissible in light of the Confrontation Clause. 541 U.S. at 68-69. The issue of face-to-face confrontation at trial was not directly implicated by *Crawford*, although *Crawford* did consider fully the historical context within which the Confrontation Clause was drafted and the evils

at which it was aimed. *Id.* at 43-50. *Crawford* did hold that testimonial hearsay statements were inadmissible absent the right to confrontation. *Id.* at 68-69. But it concluded that the Sixth Amendment as informed by the common law required, at least in the context of testimonial hearsay, "unavailability and a prior opportunity for crossexamination," not face-to-face confrontation at trial. *Id.* at 68.

C. *Craig Was Not Overruled by Implication*

*Crawford* did not purport to overrule *Craig* explicitly; *Craig* is not even cited in the opinion. In light of the dissent in *Craig* and the plethora of state and federal laws permitting remote testimony, including M.R.E. 611 and R.C.M. 914A, we expect that if the Supreme Court were overruling or undermining *Craig*, it would have said so explicitly. *See, e.g., Carmell v. Texas*, 529 U.S. 513, 538 (2000) (stating that where the Supreme Court expressly overruled two cases in a decision, it should not be assumed that it impliedly overruled a third in the same decision).

Appellant, nonetheless, argues that *Crawford* overruled *Craig* by implication because it undermined the foundations upon which it rested. Of course, overruling by implication is disfavored. *See Eberhart v. United States*, 546 U.S. 12, 19-20 (2005) (stating that circuit courts should adhere to precedent even when subsequent decisions call earlier Supreme Court decisions into question);

*State Oil Co. v. Khan*, 522 U.S. 3, 19 (1997) (stating the same); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (stating "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). But even if overruling by implication were acceptable, we disagree that *Crawford* had the impact on *Craig* that Appellant suggests.

*Crawford* explicitly rejected the rationale of *Ohio v. Roberts*, 448 U.S. 56 (1980). 541 U.S. at 63-65. *Roberts* held that admitting the preliminary hearing testimony of an unavailable witness did not violate the Confrontation Clause of the Sixth Amendment, reasoning that reliability could be "inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" because "hearsay rules and the Confrontation Clause are generally designed to protect similar values," and "stem from the same roots." 448 U.S. at 66 (citations and quotation marks omitted). *Roberts*, like *Craig*, turned in part on reliability. But the focus in *Craig* was not simply on reliability, but on the adversarial process. 497 U.S. at 846 ("The combined effect of these elements of confrontation. . . serves the purpose of the Confrontation Clause by ensuring that evidence admitted against the accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."). That

focus was retained in *Crawford*, 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence" and that "reliability be assessed . . . by testing in the crucible of crossexamination."). It is important to recognize that *Crawford* did not hold that face-to-face confrontation is required in every case. Rather, it held that the Confrontation Clause required cross-examination and unavailability before testimonial hearsay could be admitted into evidence. *Id.* at 69.

In fairness to Appellant, there are glimmers of an interpretation of the Confrontation Clause tied more closely to its text and historical context in the Supreme Court's recent opinions. *See Davis v. Washington*, 126 S. Ct. 2266, 2274-77 (2006) (discussing text of the Confrontation Clause, citing to the dictionary definition of "testimony," reviewing early American cases involving the right to confrontation, and comparing the evidence adduced in *Davis* to that in Raleigh's Case, 2 How. St. Tr. 1 (1603)); *Crawford*, 541 U.S. at 43-47 (discussing historical framework of the right to confrontation within the context of English and American common law dating to 1554). And no one, having read the dissent in *Craig*, doubts that it argues for an undilutable requirement for face-to-face confrontation at trial.

Moreover, the *Crawford* opinion itself contains statements that are difficult to reconcile with certain other statements in the *Craig* opinion. Compare, e.g., *Craig*, 497 U.S. at 848 ("a literal reading of the Confrontation Clause would

'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme'") (citation omitted), and *id.* at 845 ("any exception to the right 'would surely be allowed only when necessary to further an important public policy'") (citation omitted), with *Crawford*, 541 U.S. at 51 ("[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices"), *id.* at 54 ("[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts"), and *id.* at 61 ("[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation").

But the question is neither whether tension exists between aspects of particular cases nor whether this Court, as a matter of first impression, might hold that the Confrontation Clause of the Sixth Amendment gives a criminal defendant the "'right to meet face-to-face all those who appear and give evidence at trial'" in every case, without exception. *Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)). "Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted); see U.S. Const. art. III, § 1; *Eberhart*, 546 U.S. at 19-20. The Supreme Court has not overruled *Craig* nor distinguished its holding in a manner that alters its application to

military practice. Nor have the parties proffered any reason why *Craig* should apply differently in the military context. Under these circumstances, this Court is not free to disregard *Craig*.

We join the weight of authority in holding that *Craig* continues to control the questions whether, when, and how, remote testimony by a child witness in a criminal trial is constitutional. *United States v. Yates*, 438 F.3d 1307, 1313-18 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 553-54 (8th Cir. 2005); *State v. Henriod*, 2006 UT 11, ¶ 13-17, 131 P.3d 232, 237; *State v. Blanchette*, 134 P.3d 19, 29 (Kan. Ct. App. 2006); *State v. Griffin*, 202 S.W.3d 670, 680-81 (Mo. Ct. App. 2006); *State v. Vogelsberg*, 2006 WI App 228, ¶ 13-17, 297 Wis. 2d 519, 527-29, 724 N.W.2d 649, 654.

IV. *Decision*

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Appendix B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL
APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY K.K. THOMPSON R.G. KELLY

UNITED STATES

v.

Daniel PACK, Jr.
Gunnery Sergeant (E-7), U. S. Marine Corps

NMCCA 200400772 Decided 26 October 2006

Sentence adjudged 10 October 2002. Military Judge: P.J. Betz, Jr.

Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel

Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

THOMPSON, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of six specifications of indecent acts with a minor, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 23 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have carefully examined the record of trial, the appellant's six assignments of error,[1] the

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[1] I. APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE MILITARY JUDGE ALLOWED [MP] TO TESTIFY FROM A REMOTE LOCATION VIA ONE-WAY CLOSED-CIRCUIT TELEVISION.

II. THE MILITARY JUDGE ERRED IN NOT GRANTING A DEFENSE MOTION FOR CONTINUANCE WHERE, ONE WEEK BEFORE TRIAL, THE GOVERNMENT ANNOUNCED ITS INTENTION TO CALL TWO EXPERT WITNESSES AND MOVE FOR REMOTE TESTIMONY PURSUANT TO M.R.E. 611.

III. APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE MORE THAN TWO YEARS ELAPSED

Government's response, the appellant's affidavit and those of his trial defense attorneys, the affidavit of the trial counsel and the military judge, and all appellate pleadings. We find that corrective action is required.

Although not raised as an issue on appeal, we find that Specification 3 of the Additional Charge is multiplicious for findings with Specification 1 of that Charge. We will take corrective action in our decretal paragraph. Our decision in this regard renders moot the appellant's fourth assignment of error contesting the legal sufficiency of Specification 3 of the Additional Charge. We also find that the appellant's third assignment of error, an allegation that his right to

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AFTER HE WAS SENTENCED BEFORE HIS CASE WAS DOCKETED WITH THIS COURT.

IV. APPELLANT'S CONVICTION FOR INDECENT ACTS WITH A MINOR IS LEGALLY INSUFFICIENT WHERE APPELLANT ONLY EXPOSED HIMSELF TO THE MINOR AND DID NOT TOUCH HER. (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

V. A SENTENCE OF TWENTY-THREE YEARS CONFINEMENT IS INAPPROPRIATELY SEVERE GIVEN THE FACTS OF THIS CASE.

VI. BECAUSE OF A SLEEPING MEMBER, THE APPELLANT DID NOT RECEIVE A FAIR TRIAL. (Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

speedy post-trial review has been violated, has merit under Article 66, UCMJ, and we will take corrective action in our decretal paragraph. Following corrective action, we conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

**Right to Confrontation**

In his first assignment of error, the appellant asserts that his Confrontation Clause rights under the Sixth Amendment were violated as a result of the child victim testifying via closed-circuit television outside of the appellant's presence. We disagree.

The appellant sexually molested his eight-and-a-half-year-old step-daughter, MP, by inappropriately fondling her, kissing her, rubbing his penis against her vagina, licking her vagina, forcing her to touch his penis and showing his penis to her. These acts occurred on numerous occasions throughout a period in excess of one year. As a result of the appellant's actions, MP experienced psychological problems requiring extensive counseling.

During a preliminary session, the prosecution moved to allow MP to testify from a remote location, in accordance with MILITARY RULE OF EVIDENCE 611(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) and RULE FOR COURTS-

MARTIAL 914A, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The defense counsel opposed the request.

The Sixth Amendment to the Constitution of the United States assures a person facing trial on criminal charges the right "to be confronted with the witnesses against him." The Confrontation Clause "reflects a preference for face-to-face confrontation at trial." *See Ohio v. Roberts*, 448 U.S. 56, 63 (1980). This preference, however, "must occasionally give way to considerations of public policy and the necessities of the case." *Maryland v. Craig*, 497 U.S. 836, 849 (1990)(quoting *Mattox v. United States*, 156 U.S. 237, 243 (1985)). In *Craig*, the Supreme Court held that the Confrontation Clause was satisfied in cases involving child victims where: 1) there was a case-specific finding that the presence of the accused during the child's testimony would result in trauma which would impair the child's ability to communicate; 2) the impact on the child would be more than *de minimis*; 3) the child testified under oath; 4) the child was subject to cross-examination; and 5) the child was able to be observed by the judge, jury, and defendant as the child testified. *Id.* at 855-56.

Following the decision in *Craig*, Congress enacted the Comprehensive Crime Control Act of 1990. Pub. L. No. 101-647, 104 Stat. 4789. Included in that legislation was a provision, codified at 18 U.S.C. § 3509, authorizing federal courts to take testimony by two-way closed-circuit

television in cases involving children as witnesses. That statute formed the basis for the new MIL. R. EVID. 611(d) which provides for an alternative to courtroom testimony by minor witnesses, as follows:

> (3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:
>
> (A) The child is unable to testify because of fear;
>
> (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
>
> (C) The child suffers from a mental disease or other infirmity; or
>
> (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.
>
> (4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).

A military judge's finding of necessity, i.e., that there is a likelihood that the child will suffer at least moderate emotional and mental harm if required to testify in the accused's presence, is a question of fact which "will not be reversed unless it is clearly erroneous or unsupported by the record." *United States v. Anderson*, 51 M.J. 145, 150 (C.A.A.F. 1999)(quoting *United States v. Longstreath*, 45 M.J. 366, 373 (C.A.A.F. 1996). We review a military judge's conclusions of law *de novo*. *United States v. Daulton*, 45 M.J. 212, 219 (C.A.A.F. 1996); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

The military judge conducted an evidentiary hearing on the Government's motion. The military judge recognized Dr. Pacini, a psychologist who treated MP for several months prior to the trial, as an expert in psychotherapy and clinical psychology. Dr. Pacini testified extensively concerning how MP was dealing with the past trauma of the appellant's actions. Dr. Pacini stated that during his therapy sessions with her, MP often experienced stomach aches, curled up in a fetal position, cried, and retreated into silence. He further indicated that MP was retraumatized whenever she spoke of the incidents involving the appellant. Dr. Pacini opined that MP would be more traumatized if she had to testify in the presence of the appellant, and added that to do so would be extremely damaging to her.

Based on this testimony and the applicable law, the military judge entered findings of fact and

conclusions of law on the record. Record at 170-76. The military judge concluded there was a substantial likelihood that MP would suffer emotional trauma from testifying in the presence of the appellant, and that this trauma would not be *de minimis*. Record at 175-76.

There is ample evidence within the record to support the military judge's findings, and his conclusions are not influenced by an erroneous view of the law. We adopt these findings of fact and conclusions of law as our own and find that the military judge, applying the criteria of both MIL. R. EVID. 611(d)(3) and *Craig*, did not abuse his discretion in granting the Government's motion.

We are not persuaded by the appellant's further contention that the decision in *Crawford v. Washington*, 541 U.S. 36 (2004) renders the holding in *Craig* unsound. *Crawford* applies only to testimonial statements made prior to trial. The live, remote video testimony at issue in this case was presented at trial. In addition to being a departure from long-standing precedent, the appellant's reasoning assumes away the constitutional issue in this case – whether the confrontation that occurred is constitutionally sufficient. *Crawford* does not address this question. The proper standard to be applied is that set forth in *Craig*, not *Crawford*. Applying that standard, we hold that the appellant's right to confrontation of the witness in this case was not violated. This assignment of error is without merit.

**Denial of Defense Continuance Request**

The appellant contends that the military judge erred in denying his request for a continuance. We disagree.

The appellant's trial was scheduled to begin on 7 October 2002. On 27 September 2002, the Government announced its intention of calling Dr. Horowitz to testify on the merits concerning the child abuse accommodation syndrome and whether MP displayed any traits consistent with this syndrome. Dr. Horowitz was scheduled to see MP on 30 September. The Government advised the defense that Dr. Horowitz would be available to speak to them concerning the results of her examination of MP and her testimony any time after the appointment. Dr. Horowitz was well-known to the defense prior to the appellant's trial. At trial, and prior to Dr. Horowitz' testimony, the defense counsel advised the court that he had already interviewed Dr. Horowitz. Record at 425.

The Government notified the defense of its motion to allow the remote testimony of MP on 30 September 2002. In support of this motion, they announced they would present the testimony of Dr. Pacini, a psychologist who had been treating MP for the past several months. He would testify concerning the effects upon MP of having to testify in front of the appellant. The defense requested a continuance on 3 October 2002, four days before the trial was to begin, in order to hire an expert to rebut Dr. Pacini's opinion. At this time, the

defense also renewed its request for the Government to provide an expert to rebut the testimony of these two doctors.

The military judge denied the defense motion for a continuance and denied the request for an expert witness, entering his findings of fact on the record. The military judge found that the defense had been granted two prior continuances, noting that the appellant had been in pretrial confinement for almost eight months. The defense had been granted their earlier request for access to an expert witness. The defense decided not to consult an expert witness even though they were aware of the possibility of the Government putting on expert testimony pertinent to the issues of child abuse. Because of this decision, the military judge found that the request for an expert at that point in time appeared to be based on an effort to continue the case vice a genuine need to consult an expert. Furthermore, the military judge found that, for the purposes of the motion for remote testimony, an expert was not needed, stating that the defense counsel was able to speak to the Government's witness and cross-examine him. Although the defense counsel asserted that he was not ready to cross-examine Dr. Pacini, the military judge allowed him wide latitude in his questioning. Record at 168-70.

"The military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Art. 40, UCMJ. The military judge sets the time for

each session of a court-martial. R.C.M. 801(a)(1). "A continuance may be granted only by the military judge." R.C.M. 906(b)(1). "Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; [and] the interest of Government in the order of trial of related cases . . . ." *United States v. Weisbeck,* 50 M.J. 461, 464 (C.A.A.F. 1999)(alteration in original)(quoting R.C.M. 906(b)(1), Discussion).

A military judge's decision to deny a continuance is tested for an abuse of discretion. *Id.*; *United States v. Miller,* 47 M.J. 352, 358 (C.A.A.F. 1997). The military judge commits an abuse of discretion when his reasons or rulings are "clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice." *Weisbeck,* 50 M.J. at 464.

In *Weisbeck*, our superior court applied the following twelve factors before concluding that the military judge abused his discretion by denying a six-week defense continuance to permit a defense expert to testify:

> Surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible

impact on verdict, and prior notice.

*Id.* (quoting *Miller*, 47 M.J. at 358).

Applying the twelve *Weisbeck-Miller* factors to this case, we conclude:

> (1) *Surprise.* There was some surprise in this case. The defense counsel was notified ten days prior to trial of the Government's intention to call Dr. Horowitz to testify on the merits. Dr. Horowitz' telephone number was provided to the defense counsel to enable them to contact her concerning her testimony. The defense counsel was notified of the Government's motion for remote testimony one week before trial. The defense counsel did not move for a continuance until 3 October, four days before trial. Although claiming surprise in this regard, the defense counsel was well-aware of the possibility of this issue being raised. Indeed, he decried the lateness of the Government's motion, stating to the court that this was not a "hidden issue", and asserting it was a contingency the Government should have been well-aware of and prepared for.

Record at 123.

(2) *Nature of the Evidence.* Both

doctors were called for very limited purposes. Dr. Pacini was called for the limited purpose of presenting evidence concerning the impact on MP of testifying in front of the appellant. Dr. Horowitz was called concerning one aspect of the child abuse accommodation syndrome and her opinion as it related to MP.

(3) *Timeliness.* The defense requested a continuance over a week after receiving notice that Dr. Horowitz would testify, and three days after receiving notice that Dr. Pacini would testify. As pointed out by the military judge, granting a continuance to the defense to obtain and consult with an expert could result in a delay as long as two months. The victim and her family were living in Georgia at the time of the trial. Delay at that point in the process could have had great adverse impact on the availability of the child witness.

(4) *Substitute Testimony or Evidence.* This factor is not a concern, because the request was not based upon any alleged unavailability of evidence.

(5) *Availability of Witness or Evidence Requested.* Earlier in the proceedings, the defense requested and was

granted access to an expert witness. Furthermore, the Government provided an expert witness, CDR Dulley, concerning false accusations in child abuse cases. AE XIII. Although deciding to obtain the services of another expert witness, the defense counsel later determined that they would not call either expert. They made no effort to contact any other expert witness, either on their own or as provided by the Government.

(6) *Length of Continuance.* The defense did not specify the length of the requested continuance, stating they required a "significant period." Record at 119.

(7) *Prejudice to Opponent.* As pointed out by the military judge, granting a continuance to the defense to obtain and consult with an expert could result in a delay as long as two months. The victim and her family were living in Georgia at the time of the trial. They had already been flown out to California for the trial when the defense requested a continuance. Delay at that point in the process could have had great adverse impact on the availability of the child witness.

(8) *Prior Continuances.* The defense had previously been granted continuances on two occasions.

(9 & 10) *Good Faith and Reasonable Diligence of Moving Party.* The defense counsel, in spite of ample opportunities, did not exercise reasonable diligence to contact and consult with an expert concerning the possible issues raised by the pending testimony of both Dr. Horowitz and Dr. Pacini.

(11) *Possible Impact on the Verdict.* The testimony of Dr. Pacini and Dr. Horowitz was limited in scope and had little impact on the verdict. The Government's proof relied mainly upon the testimony of MP and her mother, to whom the appellant made incriminating admissions concerning his conduct with MP.

(12) *Prior Notice.* The military judge's order gave civilian defense counsel four days to prepare for Dr. Horowitz' testimony. We find the time was adequate, given that he was assisted by detailed military counsel and was familiar with Dr. Horowitz and her mode of testifying. The defense was also well-aware of the chance that MP might be unable to testify in front of

> the appellant, and therefore had plenty of time to prepare for a possible motion by the Government for remote testimony under MIL. R. EVID. 611(d). Record at 123. Furthermore, it is clear that the defense counsel possessed the expertise necessary to conduct thorough cross-examinations of both Dr. Pacini and Dr. Horowitz.

Considering the relevant *Weisbeck-Miller* factors, we conclude that the military judge did not abuse his discretion in denying the request. The record and the law fully support his findings and conclusions. Where the delay might result in having the child witness become "unavailable", it was not an abuse of discretion to deny the continuance request. *See United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995). Furthermore, we find no evidence of prejudice to the appellant resulting from the military judge's ruling. *See Weisbeck*, 50 M.J. at 465. This assignment of error is without merit.

**Post-Trial Delay**

In his third assignment of error, the appellant contends that he was denied speedy post-trial review. We agree in part.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the

right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

Here there was a delay of about 665 days from the date of trial to the date the case was docketed at this court. The record of trial for this contested, general court-martial contains 573 pages and was authenticated 90 days after the court-martial was adjourned. The appellant submitted clemency matters on three separate occasions and the convening authority was deployed to Iraq at some point in the review process. This case was both tried and docketed with this court prior to the date our superior court decided *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), so the presumptions of unreasonable delay do not apply here. Nevertheless, we find that the delay in this case was facially unreasonable, triggering a due process review.

Regarding the second factor, the Government concedes that the lapse of 313 days between the convening authority's action and the docketing of

this case is "dilatory and unacceptable."[2]

Looking to the third factor, we find no assertion of the right to a timely appeal prior to the filing of the appellant's motion on appeal. As to the fourth factor, prejudice, the appellant contends that he remains incarcerated in Fort Leavenworth and, therefore, separated from his family, as he is unable to be transferred to the federal prison system until his appeals are exhausted. Because we do not find error in his court-martial, the appellant's incarceration is not an "extreme circumstance" that gives rise to a strong presumption of evidentiary prejudice. Thus, we conclude that there has been no due process violation resulting from the post-trial delay. *Jones,* 61 M.J. at 83. We balance these factors, "with no single factor being required to find that post-trial delay constitutes a due process violation." *United States v. Toohey* (*Toohey II*), 63 M.J. 353, 359 (C.A.A.F. 2006)(quoting *Moreno*, 63 M.J. at 136). On balance, we conclude that there has been no due process violation.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62

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[2] Answer on Behalf of the Government of 29 Mar 2006.

M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*), we hold that the delay in this case impacts the sentence that "should be approved." *See* Art. 66(c), UCMJ. The appellant is entitled to sentence relief for excessive post-trial delay, and we will take corrective action in our decretal paragraph.

**Sentence Appropriateness**

The appellant's fifth assignment of error contends that his sentence to confinement for 23 years is inappropriately severe. We disagree.

Sentence appropriateness involves the "'individualized consideration' of the particular accused on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003)(citing *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)), *rev'd on other grounds*, 60 M.J. 344 (C.A.A.F. 2004).

Here, the appellant, a gunnery sergeant, repeatedly sexually molested his eight-year-old stepdaughter for over a year. As a result, the victim has on-going psychological problems, and may experience difficulties developing healthy,

normal adult relationships later in life. The crimes perpetrated by the appellant are serious offenses which call for serious punishment. Considering all of the circumstances of this case, and applying the principles of *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we conclude that a sentence that includes a dishonorable discharge, confinement for 23 years and a reduction in pay grade to E-1 appropriate for these offenses and this accused. This assignment of error is without merit.

**Inattentive Member**

The appellant's sixth assignment of error contends that he was denied a fair trial because one of the panel members was asleep during trial. We disagree.

The issue was first raised by the appellant in his submission to the convening authority. The appellant's civilian defense counsel, Mr. David Brahms, raised the matter, stating that a panel member was observed to be sleeping during the trial. He asserts that this was brought to the attention of the military judge "who took only pro forma action in response thereto."[2] In an affidavit dated 21 December 2005, the appellant also

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[2] Defense Counsel Comments to Commanding General, 1st Marine Division of 19 May 2003, ¶ 6. (There are two footnotes assigned as #2 in the service court's opinion).

[3] Appellant's Affidavit Pursuant to *United States v. Grostefon*.

contends that he observed a panel member asleep during his trial.[3] In an affidavit dated 30 August 2005, Lieutenant Colonel (LtCol) Phillip Simmons, the military defense counsel, indicated that one of the enlisted members "appeared" to be sleeping. He states he brought this to the attention of the civilian defense counsel, however, he states his belief that no mention of this was made on the record.[4]

The Government provided two affidavits, one from the trial counsel, Major (Maj) Muscari, and one from the military judge, LtCol Betz. In her undated affidavit, Maj Muscari stated that she never observed any member sleeping during the trial, nor was this issue ever brought to the attention of the court, either in or out of her presence.[5] LtCol Betz' affidavit corroborates Maj Muscari's affidavit, stating that, at no time during *voir dire* or after the panel was assembled, was any member inattentive or asleep. These affidavits are corroborated by a review of the record of trial in which there is no mention of this matter at any point during the trial.

We resolve the appellant's claim based upon

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[4] Appellant's Motion to Attach of 31 Aug 2005, Declaration of LtCol Phillip Simmons, USMC.

[5] Government Motion to Attach of 29 Mar 2006, Affidavit of MAJ Lisa Muscari, USMC.

the record before us and the affidavits presented. *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997). In *Ginn,* our superior court announced six principles to be applied by courts of criminal appeals in disposing of post-trial collateral, affidavit-based claims. Under the fourth principle, we find that the record as a whole compellingly demonstrates the improbability of the facts as alleged by the appellant. *Id.* This assignment of error is without merit.

## Multiplicity

Although not raised as an issue on appeal, we consider whether the appellant's convictions for Specifications 1 and 3 of the Additional Charge alleging indecent acts under Article 134, UCMJ, violate the Double Jeopardy Clause of the Fifth Amendment.

At trial the appellant moved to dismiss Specification 3 under the Additional Charge, as muliplicious with Specification 1 under that Charge. Both specifications were charged under Article 134, alleging commission of an indecent act. Specification 3 alleged that the appellant committed an indecent act by showing his penis to MP. Specification 1 alleged that the appellant forced MP to touch his penis. Both specifications alleged the same time frame for commission of the offense. Based on the Government's proffer that the offenses occurred on separate dates during this time frame, the military judge found that the specifications were not multiplicious. Appellate

Exhibit VIII.

After the conclusion of the Government's case-in-chief, the defense renewed its multiplicity motion. Record at 542. At that time the military judge determined that the evidence introduced at trial clearly showed that the instance where MP was forced to touch the appellant's penis and the instance where MP was shown the appellant's penis occurred at the same time. Record at 546. However, the military judge ruled that the specifications were multiplicious only as they affected sentencing, resulting in an additional conviction of the appellant.

Specifications are multiplicious for findings if each alleges the same offense, or if one offense is necessarily included in the other. R.C.M. 907(b)(3)(B), Discussion. "A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways." *Id.* We must determine whether the charges are the result of the same event. *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993); *United States v. Neblock*, 45 M.J. 191, 196 (C.A.A.F. 1996). This factual determination is necessary to determine if multiple charges arose out of the same event or different events. If the charged offenses are the result of different events they are not multiplicious. *Id.*

We agree with the military judge's assessment of the evidence adduced at trial and find that both specifications occurred at the same

time, arising out of a single continuous act. However, we disagree with the military judge's ruling that the specifications were multiplicious only to the extent that sentencing was affected. We find that Specification 3 has no independent existence apart from the conduct alleged in Specification 1 of the Additional Charge and, accordingly, will take corrective action disapproving the guilty finding and dismissing Specification 3 in our decretal paragraph. We will now reassess the sentence.

Our decision does not change the maximum authorized sentence considered by the members. The military judge ruled the two specifications multiplicious for sentencing and so instructed the members during sentencing. Our conclusions regarding multiplicity, however, encompass findings as well as sentence. Therefore, we reassess the adjudged sentence on the basis of our decision regarding multiplicity and the entire record, applying the criteria of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and *Sales*, 22 M.J. at 308, and find that the sentence as adjudged is still appropriate and no greater from that which would have been adjudged if the error had not occurred.

## Conclusion

Accordingly, the finding of guilt as to Specification 3 under the Additional Charge is disapproved and that specification is dismissed. The remaining findings of guilt, and only that

portion of the approved sentence as extends to a dishonorable discharge, confinement for 22 years, and reduction to pay grade E-1, are affirmed.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H.TROIDL

Clerk of Court

## Appendix C

## UNITED STATES CONSTITUTION

Amendment VI - Right to Speedy Trial, Confrontation of Witnesses.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.